United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7111

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARY SULLIVAN, Individually and on behalf of all others similarly situated,

Plaintiff-Appellant

-v-

PHILIP SACCONE, Individually and as Chief Clerk of the City Court of Rochester and LORRAINE PIETRANTONI, Individually and as Assistant Court Clerk of the City Court of Rochester and both as representatives of all others similarly situated,

Defendants-Respondents.

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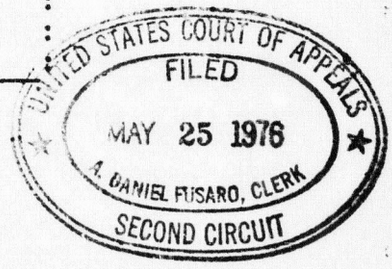

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RESPONDENTS' BRIEF

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STATEMENT OF ISSUE PRESENTED

Is a claim that the Constitution forbids entry of judgment for a sum certain by a clerk following default by a party given valid notice of the proceeding one of sufficient substance to warrant the convening of a three-judge court pursuant to 28 U.S.C. 2281?

The District Court held in the negative.

STATEMENT OF THE CASE

The basic facts of this case are as stated in the Appendix at pages 35 - 37. Appellant's motion for the convening of a three-judge court pursuant to 28 U.S.C. §2281 et. seq. to hear further motions for orders certifying the action as a class action and declaring New York Civil Practice Law and Rules §3215 unconstitutional was denied and the action dismissed by the Honorable Harold P. Burke by decision dated March 1, 1976.

ARGUMENT

POINT I

THE ISSUES RAISED IN PLAINTIFF'S COMPLAINT ARE FRIVOLOUS AND INSUBSTANTIAL.

"28 U.S.C. 2281 does not require the convening of a three-judge court when the Constitutional attack on the State statute is insubstantial." Goosby v. Osser, 409 U.S. 512, 35 L.Ed. 2d 36, 93 S.Ct. 854. Goosby states, in effect, that a constitutional attack on a State statute is insubstantial where it is essentially fictitious or obviously without merit, or where prior decisions of the Supreme Court clearly render the claim unsound. Under this standard, the District Court properly dismissed Appellant's claim.

The Appellant herein asserts that she is relying on the Due Process Clause of the 14th Amendment of the Constitution of the United States. She is, however, seeking to add to the concept of due process a new element, one never articulated by the courts of this country, nor even hinted at in case law.

There is no question that Appellant has the right to invoke the aid of the courts in defending any action brought against her. And by invoking that aid it is assumed that a member of the judiciary will be available to render judgment on the matter based on evidence placed before him by parties on both sides. But, the essence of due process has long been held to mean: notice and an opportunity to be

heard. In Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) the Supreme Court reasserted its longstanding definition of due process:

> Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordeau, 234 U.S. 385, 394; 58 L.Ed. 1363, 1368; 34 S.Ct. 779. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
> 339 U.S. 306, 314, 94 L.Ed. 865, 873.

Appellant concedes in the pleadings and in her brief that she was served with a summons in the original proceeding, albeit by substituted service. The question of notice is not at issue, and valid, prior notice to plaintiff is therefore assumed. Appellant has made no assertion that any conduct on the part of respondents prevented her from appearing in the original proceeding, or from obtaining a hearing at which defenses might have been raised on her behalf. Thus, there can be no question that Appellant was afforded all rights to which she is entitled under the traditional notion of due process of law.

It becomes apparent, then, that Appellant is seeking more than what has heretofore been considered due process. She is asserting, in effect, that the right to invoke judicial scrutiny of a claim against oneself is unwaivable, and should be guaranteed even in the face of a default in appearing against the claim. She is saying that such a right is so precious that it must be preserved even in the absence of its assertion by the party to whose benefit it accrues.

This assertion is frivolous for several reasons. First, the Supreme Court has never held that due process requires more than proper notice and an opportunity to be heard. But it has recently held that due process includes something less. In Mitchell v. Grant, 416 U.S. 600, 40 L.Ed. 2d 406, 94 S.Ct. 1895 (1974) the Supreme Court held that procedural due process is not violated by a Louisiana Statute which allows the sequestration of personal property without prior notice and an opportunity to be heard. The court noted that Louisiana law sufficiently protects the debtor's interest in the property, and most significantly, requires the scrutiny of a judge (as opposed to a clerk or other official) prior to the issuance of a writ of sequestration. The court apparently substituted judicial examination of the grounds for the writ in place of notice and an opportunity to be heard. This case does nothing to expand the traditional concept of procedural due process. If anything, it is a retreat from a rigid standard

to a looser interpretation aimed at overall fairness. As the Court stated in Mitchell: "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary'. Inland Empire Council v. Millis, 325 U.S. 697, 710, 89 L.Ed. 1877, 65 S.Ct. 1316 (1945)." In light of Mitchell, it seems frivolous to assert that due process implies a right to judicial examination of the claim against oneself, which right cannot be waived, where one has defaulted in appearing after receiving valid notice.

Second, Appellant is stating that a judge should have determined that a cause of action existed on behalf of the American Finance Company against her. She does not appear to state that such a cause of action does not exist; rather that the amount of the judgment included interest to which the finance company was not entitled under the banking law. Thus, what Appellant really wants is a judicial officer who will search the law and assert on her behalf whatever defenses or partial defenses she may have to a particular judgment. The effect would be to make the judge an advocate on her behalf while at the same time attempting to maintain impartiality toward the party seeking to enter judgment. If the system Appellant is seeking is put into effect, a plaintiff might be placed in the position of having to take an appeal on a default judgment in the event a judge wrongfully determined that the defaulting party had a full or partial defense to the cause of action. Such a result seems absurd.

Third, even after defaulting, the Appellant is not foreclosed from reopening the default judgment and asserting any valid defenses she may have. The New York CPLR 5015(a)(1) reads:

> On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; ***.

Further, subsection (c) states that:

> Restitution. Where a judgment or order is set aside or vacated, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal.

Of even greater importance in this instance is CPLR 317, which states:

> A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense. If the defense is successful, the court may direct and enforce restitution in the same manner and subject to the same conditions as where a judgment is reversed or modified on appeal. This section does not apply to an action for divorce, annulment or partition.

Thus, the law of New York affords every opportunity to Appellant to appear in the action, and in the event of a default, to reopen the judgment and present meritorious defenses to the court.

Appellants assertions that the procedure allowing entry of a default judgment for a sum certain by the clerk of a court violates the due process clause of the Fourteenth Amendment is frivolous and insubstantial.

POINT II.

PRIOR DECISIONS OF THE SUPREME COURT FORECLOSE THE ISSUES RAISED ON THIS APPEAL.

Several decisions of the Supreme Court, of many years standing and of recent vintage, appear to completely foreclose the issue raised on this appeal. In the century-old case of Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914 (1876), the court asserted that:

> The period within which the appearance must be made and the right to be heard exercised, is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, and the right to be heard be not exercised, within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered, and the allegations of the libel be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all is a different matter altogether.

Clearly the court is showing a lack of concern with procedures followed after a party has defaulted in appearing in the action. This lack of concern was reasserted in Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed. 2d 113, 91 S.Ct. 780, where the court stated:

> Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A state, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance. What the Constitution does require is an opportunity...granted at a meaningful time and in a meaningful manner, Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed. 2d 62, 66, 85 S.Ct. 1187 (1965) (emphasis added), for [a] hearing appropriate to the nature of the case, Mullane v. Central Hanover Trust Co., supra, at 313, 94 L.Ed. at 873.

In D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174, 31 L.Ed. 2d 124, 92 S.Ct. 775 (1972), the Court held that not only are due process rights to notice and hearing waivable, but they are waivable in advance. The court there upheld the constitutionality of a cognovit note, whereby Overmeyer consented to entry of judgment against it in the event of default without prior notice of such proceeding. Said the court "The due process rights to notice and hearing prior to a civil judgment are subject to waiver." This puts to rest Appellant-implied contentions that the right to judicial examination of the cause of action against her is unwaivable. And in a case companion to Overmeyer, the Court held facially constitutional a Pennsylvania statute providing for entry of judgment on cognovit notes by a prothonotary, a non-judicial official of the court. Swarb v. Lennox, 405 U.S. 191, 31 L.Ed. 2d 138, 92 S.Ct. 767 (1972). The court apparently found nothing wrong

with entry of judgment by an official serving a function almost identical to that of the respondents. And the court was fully aware of the lack of judicial supervision in such procedure:

> It is apparent, therefore, that in Pennsylvania confession-of-judgment provisions are given full procedural effect; that the plaintiff's attorney himself may effectuate the entire procedure; that the prothonotary, a nonjudicial officer, is the official utilized; that notice issues after the judgment is entered; and that execution upon the confessed judgment may be taken forthwith.

Appellant's brief states that the question of waiver is not involved in this action, and that Appellant "never consented, either voluntarily or otherwise, to the entry of judgment against her." But if a default in appearance cannot be construed as a waiver of right to a hearing, then no judgment could ever be entered against a defaulting defendant, and such a defendant could prolong the proceedings ad infinitum simply by refusing to appear. Beyond that, Appellant concedes that a judgment may constitutionally be entered against her by default, even where she has not so consented, if such judgment is ordered by a judge of the court.

Appellant cites McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 351 (1930) and Falk v. Krumm, 39 Misc. 2d 448, aff'd. 22 A.D. 2d 911 (2nd Dept., 1964) for the proposition that in New York a

default in appearance does not admit liability but simply admits the factual allegations of the complaint. However, in both cases, the defendants appeared in the action. In McClelland, the defendant appeared but did not answer the allegations in the complaint. In Falk, the defendant appeared, but defaulted at time of trial, implying that an issue had been drawn. A simple analysis of the New York State default judgment statute shows that liability is presumed upon default, the only question remaining being one of damages.

Since Appellant can be presumed to have waived her right to a hearing, thus conceding liability, an analogy to the factual situation in Swarb can be drawn. The Supreme Court there found nothing wrong with entry of judgment by a non-judicial officer of the court, provided the waiver of right to notice and hearing was voluntary. Since the question of notice to Appellant is not in issue here, and waiver of a hearing is presumed, the Supreme Court's prior decisions, particularly Swarb, foreclose the question of the propriety of entry of default judgment by a non-judicial officer. Such a procedure is constitutionally correct.

CONCLUSION

The order and judgment of the district court dismissing this action should be affirmed.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May, 1976, I served the foregoing Respondent's Brief upon counsel for the Appellant, by causing two copies to be mailed, post-paid, to:

K. Wade Eaton, Esq.
80 West Main Street
Rochester, New York 14614

Joseph A. Regan